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Ontario Labour Relations Board

HIGHLIGHTS

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October 2013

NEW VICE-CHAIRS

The Board welcomes **Roslyn McGilvery** as a full-time Vice-Chair. Roslyn practised labour and employment law at Filion Wakely Thorup Angeletti prior to joining the Board. She holds an LL.B from the University of Western Ontario and a Bachelor of Journalism degree. Roslyn has written on various topics in the field of labour and employment law, including co-authoring a text on the *Labour Relations Act, 199* and serving as contributing editor to a lab ur relations law reporter.

The Board also welcomes **Derek Rogers** and **Tom Kuttner** as part-time Vice-Chairs.

MANAGER, FIELD SERVICES

The Board is happy to announce the appointment of **Travis Kearns** to head the Mediator group at the Board. Travis graduated from Osgoode Hall Law School in 1999 was called to the bar in 2001. He then worked as a lawyer and joined the Board in 2005 as a Labour Relations Officer. He was promoted to Labour Relations Specialist (Construction) in April of this year and for the past 19 months has been the acting Assistant Manager of Field Services.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in September of this year. These decisions will appear in the September/ October issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute at www.canlii.org.

Certification – Construction Industry – Practice and Procedure – Reconsideration – The IBEW and CLAC filed certification applications for similar bargaining units one week apart – The Board earlier determined it would treat the applications as if they had been filed on the same day, pursuant to s. 111(3)(a) of the Act – The IBEW sought reconsideration of that ruling as well as permission from the Board to have the dates of the CLAC membership cards disclosed – The Board held that the timing of the collection of CLAC's cards was relevant to the adjudication of both applications and in particular to the IBEW's argument relating to employer support of the CLAC application – Because the Board had treated the CLAC application as having been made on the date of the IBEW application in a "duty decision" without representations from the parties, and in light of the circumstances surrounding the IBEW's allegations, the Board reconsidered its earlier decision and invoked s. 111(3)(b) to postpone consideration of the CLAC application until the final decision is released in the IBEW application – Reconsideration granted – Matters continue

1187855 ONTARIO INC. O/A CLARIDA CONSTRUCTION & MAINTENANCE; RE: International Brotherhood of Electrical Workers, Local 586; OLRB File Nos. 0609-13-R; 0724-13-U; 0722-13-OH and 0667-13-R; Dated September 20, 2013; Panel: Jack J. Slaughter (17 pages)

Certification – Construction Industry – Practice and Procedure – Reconsideration – Local 183 failed to file timely submissions to address the employer's "nil" Schedule "A" or its alternative Schedule "B" where the employer listed eight individuals it said it had engaged to work – In its original determination, the Board dismissed the application for certification, holding that the exchange of time-sensitive information is crucial in certifications, especially so in the construction industry – In the reconsideration request, Local 183 argued that the Board incorrectly concluded that the employer was prejudiced by the delay and that the Board should have considered the entire context of the application and issued a less punitive result than outright dismissal – The Board rejected Local 183's submissions, reiterating the necessity of timely and accurate details in certification applications – The Board acknowledged that it routinely takes administrative notice of prejudice when either party delays delivery or filing of its submissions – The Board held that because time cannot be reversed, there is no remedy available that could put the employer into the position it would have been in had the union provided the necessary information in a timely manner – Reconsideration denied

PENEGAL TRIM & SUPPLY LTD.; RE: Universal Workers Union, Labourers' International Union of North America, Local 183; OLRB File No. 0216-13-R; Dated September 18, 2013; Panel: Lee Shouldice (22 pages)

Discharge for Union Activity – Duty of Fair Representation – Standing – Trade Union – Application by a rival union (the "Rival Union") alleging that the incumbent union (the "Union") breached its duty of fair representation by failing to file a grievance on behalf of an employee who was allegedly harassed and terminated for being an active supporter of the Rival Union – The Union argued that the Rival Union lacked standing because it did not have a direct interest in the subject matter of the application: an application under section 74 can only be brought by a bargaining unit member and, furthermore, the Rival Union did not plead any harm it had experienced – The Rival Union asserted that a section 74 application must concern a bargaining unit member but that this member need not be the applicant – The Board found that the Rival Union did not have standing to bring the section 74 application because it did not assert it was acting on behalf of the terminated employee – The Board preferred the reasoning in *Marel Contractors Ltd.* and *Hilton Toronto*, citing them for the proposition that applicants who are not bargaining unit members generally do not have a direct and legal interest in filing a duty of fair representation complaint – A trade union may under unique circumstances be able to establish a direct interest, but this was not the case here – Application dismissed

VELARD CONSTRUCTION LP; RE: Labourers' International Union of North America, Ontario Provincial District Council; RE: Canadian Union of Skilled Workers; OLRB File No. 0745-13-U; Dated September 5, 2013; Panel: John D. Lewis (6 pages)

Certification – Practice and Procedure – Reconsideration – LIUNA sought reconsideration of the dismissal of its application for certification – The application was dismissed because LIUNA had failed to properly serve the employer by mixing up two addresses from two different corporate filings: the documents had identical street addresses but listed different municipalities – The application did not reach the employer in a timely way – In its request for reconsideration, LIUNA argued that the Board failed to consider all the circumstances, failed to assess the relative prejudice to the parties, relied on unsubstantiated assumptions and, in fact, rewarded the employer for its misleading filings with government agencies – The Board denied the request for reconsideration, holding that, when it conducted the two corporate searches, LIUNA knew or ought to have known that the responding party operated its business at one of the addresses, but not both – LIUNA was aware of the conflicting addresses and in the circumstances ought to have appreciated the potential for delivery to the wrong location – Although the responding party was remiss in filing an incorrect address with one government office, that did not absolve LIUNA of its duty to make a bona fide effort to secure an accurate address for delivery of its application for certification – Reconsideration denied

WAVE.COMM RE: Labourers' International Union of North America, Ontario Provincial District Council; OLRB File No. 1384-13-R; Dated August 8, 2013; Panel: Lee Shouldice (23 pages)

Estoppel – Intervenor - Reconsideration – Termination – Bargaining Rights – The responding parties filed a request for reconsideration of the Board's decisions

terminating the responding parties' bargaining rights - The responding parties argued that their reconsideration request raised significant matters of policy, that the Board's decisions contained patent errors, and that the Board had taken irrelevant facts into consideration – The application for reconsideration was dismissed – The Board followed the balancing test between finality and undertaking a review of a decision to determine whether it ought to be reconsidered as found in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320 – In finding that the responding parties failed to set out sufficient and specific factual allegations, the Board did not adopt a new approach in how it assessed whether a party has established a *prima facie* case; therefore, the Board's decision did not give rise to a policy issue – Also, the Board was not incorrect when it dismissed the earlier application because that decision was largely driven by the Board's assessment of the credibility of the witnesses who testified, an issue the responding parties were attempting to reargue – Further, the responding parties argued that, on the basis of issue estoppel and abuse of process, the Board was required to apply the conclusions a different panel of the Board had reached in its decision dismissing the application made three years earlier; however, the Board rejected that argument, finding that although they were the same kind of applications involving the same parties, they were two different proceedings relating to two different periods of time – In addition, the responding parties argued that the applicant and the intervener had colluded to ensure that the applicant would remain employed to bring the application to terminate the responding parties' bargaining rights; however, that argument was again not supported by facts and was dismissed – Finally, the responding parties also argued that the applicant was not properly employed in the bargaining unit when he made his application; however, that argument was again not supported by facts and was dismissed - In the result, the responding parties' request that the Board reconsider its decision was therefore denied

ZZEN GROUP OF COMPANIES; RE; Rudyard A. Swaby; RE: Labourers' International Union of North America; RE: the Labourers' International Union of North America, Ontario Provincial District Council, on behalf of its affiliated Local Unions 183, 247, 493, 506, 527, 607, 625, 837, 1036, 1059, 1081 and 1089 OLRB File No. 0318-13-R; Dated September 27, 2013; Panel: Harry Freedman (7 pages)

COURT PROCEEDINGS

Collective Agreement – Construction Industry – Damages – Estoppel – Grievance – Judicial Review

EllisDon applied for judicial review seeking to quash the Board's decision that the Provincial Collective Agreement was enforceable in respect of it and the respective Unions, as a result of a 1958 document, the Sarnia Working Agreement ("SWA"), and that EllisDon violated that agreement by subcontracting work on two projects to non-union workers – The Board found, however, that the Unions were estopped from claiming relief for the violation of that agreement for two years – The Unions, for their part, also sought to review the Board's decision imposing the two year limit on the estoppel – The issues were: whether the SWA was proven; if proven, whether the doctrine of privity of contract prevented the Unions from enforcing it; whether the Unions abandoned their rights under the SWA; whether the doctrine of estoppel applied; and finally, whether the Board acted unreasonably in limiting the length of the estoppel – The Court held that the Board was unreasonable and erred in law in finding that the SWA was proven – The admissibility of the SWA hinged on questions of law outside the expertise of the Board and the instant issues were of central importance to the administration of justice – The business records rule did not apply because the reliability of the document, and the weight to be given to it, were not examined; and there was no jurisprudence indicating that the business records rule had been extended to include a contract such as the SWA – The ancient document rule was rejected for similar reasons – The concurring minority decision would have accepted the admission of the SWA, relying on the Board's power to accept evidence at its discretion - The whole Court held that the estoppel should not be limited to a two-year period, but should be permanent; for this reason, there was no point in remitting the matter back to a different panel of the Board, notwithstanding that the Board was reasonable in its conclusions on all the other issues – EllisDon's application allowed; Unions' application dismissed

ELLISDON CORPORATION; Ontario Sheet Metal Workers' and Roofers' Conference and International Brotherhood of Electrical Workers, Local 586; OLRB File No. 0784-05-G (Court File Nos. 310/12 and 363/12); Dated September 27, 2013; Panel: Molloy J., Lederer J., and Hourigan JJ. (40 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Merc Electrical Limited	0452-13-G	Pending
Nadalin Electric Company (Ontario) Inc.	0615-13-R	Pending
Sysco Fine Meats of Toronto a division of Sysco Canada Inc	3484-11-R	Pending
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
Gate Gourmet Canada Inc. Divisional Court No. 276/13	3688-11-U	Pending
Charles W. Colhoun Divisional Court No. 293/13	0260-12-U	January 8, 2014
Robert Pardy Divisional Court No. 2004/13 **(London)**	0501-12-ES	November 26, 2013
Signature Contractors Windsor Inc. Divisional Court No. 231/13	3315-12-R 3316-12-R 3317-12-R	Pending
Biggs & Narciso Construction Services Inc. Divisional Court No. 181/13	1307-10-R	January 30, 2014
Weihua Shi Divisional Court No. 158/13	0273-10-ES	November 8, 2013
Rail Cantech Divisional Court No. 127/13	1506-12-U	November 21, 2013
Durval Terciera, et al Divisional Court No. 520/12	1475-11-U	Allowed (Seeking Leave to CA)
Bur-Met Construction Divisional Court No. DC-12-010	3893-11-R	January 31, 2014
Vito Tarantino Ltd. Divisional Court No. 417/12	0356-12-R	Dismissed (Seeking Leave to CA)
OSMWRC, et al Divisional Court No. 363/12	0784-05-G	Dismissed September 27, 2013
Albert Tsoi v. UNITE HERE Divisional Court No. 330/12	3908-09-U	Pending
IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	December 9, 2013
EllisDon Corporation Divisional Court No. 310/12	0784-05-G	Allowed September 27, 2013

EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Rainbow Concrete Industries Limited Divisional Court No. 925/13 **(Sudbury)**	2692-06-ES	Week of October 7, 2013
Landmart Building Corp. Divisional Court No. DC 12-346JR **(Hamilton)**	2519-11-R	Week of February 24, 2014
John McCredie v. OLRB et al Divisional Court No. 1890/11 **(London)**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed; Seeking Motion to set aside
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574–04–R	Abandoned September 18, 2013
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above